Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 03-260
Petition for Forbearance Under	)	
47 U.S.C. § 160(c)	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits this reply to the comments submitted in connection with the Petition for Forbearance (the "Petition") filed by Qwest in this docket.[1] In the Petition, Qwest sets out the reasons why the Federal Communications Commission ("Commission") should exercise its authority to forbear from imposing an independent unbundling obligation pursuant to section 271(c)(2)(B) of the Communications Act of 1934, as amended ("Act"),[2] with respect to both narrowband and broadband network elements that are no longer required to be unbundled pursuant to section 251(d)(2) of the Act. As shown below, none of the arguments submitted by those parties opposing the Petition should properly preclude the Commission from concluding that the statutory conditions for forbearance have been satisfied and that the Petition should be granted.

I. THE REQUIREMENTS OF SECTION 271 HAVE BEEN FULLY IMPLEMENTED

Section 10(d) of the Act provides that "the Commission may not forbear from applying the requirements of section … 271 … until it determines that those requirements have been fully

[1] Petition for Forbearance of Qwest Communications International Inc., filed Dec. 18, 2003. *And see*, *Public Notice*, DA 03-4084, rel. Dec. 23, 2003.

[2] 47 U.S.C. § 151, *et seq*.

implemented." As demonstrated in the Petition,[3] the requirements of section 271 have been "fully implemented" for purposes of section 10(d) by virtue of the fact that the Bell Operating Companies ("BOCs") have fully implemented the section 271(c)(2)(B) competitive checklist in every state (as a result of which the local exchange market in every state is now fully open to competition).

In its comments, AT&T misconstrues the Commission's recent decision not to forbear from applying the rules which prohibit a BOC's section 272 affiliate from sharing operating, installation and maintenance ("OI&M") functions with that BOC or another affiliate of that BOC.[4] In particular, AT&T claims that in the *Verizon Forbearance Order*, the Commission found that "the grant of authority to provide interLATA service does not compel a finding that the 'fully implemented' requirement is satisfied…."[5] This is a misconstruction of the Commission's finding in the *Verizon Forbearance Order*. In fact, the Commission in the *Verizon Forbearance Order* found only that section 271(d)(3)(B), which specifically requires compliance with the requirements of section 272 (and which is entirely unrelated to the "competitive checklist" requirements set out in section 271(c)(2)(B)), will not be deemed "fully implemented" in a particular state until three years after section 271 authorization has been obtained in that state. The Commission went out of its way to stress that its "analysis here applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced

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[3] Petition at 17-19.

[4] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules,* CC Docket No. 96-149 (Nov. 4, 2003) ("*Verizon Forbearance Order*").

[5] AT&T Comments at 3.

requirements of section 272, and does not address whether any other part of section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[6]

Section 10(d) makes clear that only "those requirements" with respect to which a party seeks forbearance -- in this case, the competitive checklist requirements of section 271(c)(2)(B) -- must be "fully implemented" before the Commission may exercise its forbearance authority. Accordingly, section 271 should be deemed "fully implemented" for purposes of this Petition.

II. SECTION 271(d)(4) DOES NOT BAR THE REQUESTED FORBEARANCE

Several parties claim that section 271(d)(4), which provides that the Commission may not "limit or extend the terms used in the competitive checklist," bars the requested forbearance.[7] This assertion is unfounded and should be rejected. Section 271(d)(4) is aimed at ensuring full implementation of the section 271(c)(2)(B) competitive checklist *before, but not after,* a section 271 authorization has been granted. This conclusion makes perfect sense: prior to approving an application, the Commission justifiably should be foreclosed from modifying or supplanting the list of requirements spelled out in section 271(c)(2)(B). Once a section 271 application has been approved, however, the checklist requirements set out in section 271(c)(2)(B) have by definition been "fully implemented," as required by section 271(d)(3)(A)(i). Thereafter, there is no reason why the Commission should not be entitled to exercise its forbearance authority with respect to those requirements.

Moreover, section 10 explicitly authorizes -- indeed requires -- the Commission to exercise its forbearance authority once the relevant requirements of section 271 have been "fully implemented" and the other conditions of section 10(a) have been satisfied (as is the case here).

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[6] *Verizon Forbearance Order* at ¶ 6 (emphasis added).

[7] *See,* AT&T Comments at 2-3 and Joint Comments of Anew Telecommunications Corp, *et al*. at 2.

There is no plausible reason why Congress would have included a specific reference to forbearance with respect to the provisions of section 271 if section 271(d)(4) were in fact intended to prevent the Commission from *ever* exercising such forbearance authority. Thus, now that the section 271(c)(2)(B) competitive checklist has been "fully implemented" in every state, the Commission clearly has the power to exercise its forbearance authority with respect to the independent unbundling requirement of section 271.

III. AN INDEPENDENT SECTION 271 OBLIGATION WITH RESPECT TO BROADBAND ELEMENTS WILL IMPOSE SUBSTANTIAL AND UNJUSTIFIABLE OPERATING AND FINANCIAL BURDENS ON THE BOCS

As shown in the Petition,[8] the imposition of an independent section 271 unbundling obligation with respect to broadband elements will entail a variety of significant operational and financial burdens on the BOCs. In its comments, MCI relies on faulty reasoning to assert that "section 271 imposes no 'redesign' requirements and [Qwest's] claims are without merit with respect to both hybrid fiber-copper loops and Fiber-To-the-Home ('FTTH') loops."[9] As shown below, MCI's claims are groundless.

Currently, Qwest has not deployed FTTH loops in any part of its local network. Should it do so in the future, Qwest would in fact have to engage in significant "network, operations and systems modifications"[10] to allow for such unbundling. With respect to network changes, Qwest would be required to modify the equipment vendor's configuration to define the demarcations for unbundled access by a competitive local exchange carrier ("CLEC"). Operationally, Qwest would need to design and implement new processes and training procedures to facilitate the required unbundling. In addition, Qwest's inventory, provisioning, monitoring and repair

[8] Petition at 14-15.

[9] MCI Comments at 2.

[10] Petition at 14.

systems would all need to be modified to show the demarcation designations and track them accordingly. All these modifications would involve substantial time, effort and cost.

MCI's references to Qwest's unbundled packet switching ("UPS") product are similarly ill-informed and misleading. UPS, which was designed specifically to meet the requirements of the *UNE Remand Order,*[11] is a remote access architecture that relies on manual processes and is available only pursuant to the "limited exception" described in the *UNE Remand Order.*[12] In fact, no CLEC request to Qwest has yet resulted in a situation where the conditions set out in the *UNE Remand Order* have been met.

MCI implies that because Qwest has developed operational support systems ("OSS") to support the ordering of the UPS product, the OSS necessary to support *any* function associated with the FTTH product must also be in place. This is patently untrue. As noted above, Qwest's UPS product is supported only by manual processes, which means that provisioning does not automatically flow through Qwest's OSS. The fact is that Qwest has not designed an unbundled FTTH configuration to allow provisioning on a flow through basis; to do so would require substantial effort (and cost) to reconfigure Qwest's OSS.

IV. QWEST'S ARGUMENT IS NOT INCONSISTENT WITH ITS PRIOR ADVOCACY

The Petition demonstrates that the Act contemplates removal of the section 271 unbundling obligation once the corresponding section 251 unbundling obligation has been removed.[13] MCI alleges that it is "disingenuous"[14] for Qwest to make this argument in view of a

[11] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

[12] *Id.* at ¶313.

[13] Petition at 11-14.

[14] MCI Comments at 6.

statement made in an *ex parte* filing submitted to the Commission by Qwest in 2002.[15] In fact, it is MCI that is acting disingenuously.

MCI purports to quote Qwest in the White Paper as acknowledging that an unbundling obligation exists under section 271 even after a network element no longer must be unbundled under section 251.[16] However, MCI fails to describe the narrow context in which the entire White Paper was prepared. In particular, the White Paper was delivered to the Commission after Verizon had submitted its original Petition for Forbearance[17] regarding the section 271 unbundling issue. In recognition of the fact that this crucial issue was pending before the Commission, the cover page of the White Paper *explicitly* noted the filing of the Verizon Petition and added that "[f]or purposes of this *ex parte* … we have assumed that the corresponding section 271 obligation is still in force."[18] In other words, Qwest's entire argument in the White Paper, including the language quoted by MCI, was based on the assumption that the Commission ultimately would find that an independent section 271 unbundling obligation exists (despite the arguments raised by Verizon and others supporting its view). Moreover, Qwest has *never* accepted the validity of that assumption; indeed, this docket (and the related dockets involving the petitions for forbearance filed by Verizon and SBC and BellSouth's petition for reconsideration of the independent section 271 unbundling obligation) centers on the reasons why an independent section 271 unbundling obligation should be rejected. Since the language

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[15] "Regulation of an Element Found No Longer to Meet Section 251's 'Necessary and Impair' Test, " attached to *ex parte* letter from Cronan O'Connell to Marlene H. Dortch, CC Docket No. 01-338, filed Nov. 21, 2002 ("White Paper," a copy of which is attached as an Appendix to these Reply Comments).

[16] *See* MCI Comments at 5-6.

[17] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338, filed July 29, 2002.

[18] White Paper at n.1.

quoted by MCI was unambiguously tied to an assumption to which Qwest did not, and does not, subscribe, that language is of no relevance whatsoever to Qwest's past or current position on the section 271 unbundling issue. As such, there is no basis whatsoever for MCI's misleading assertion that Qwest's past advocacy is inconsistent with its arguments in this proceeding.

CONCLUSION

For reasons set forth above, the Commission should grant the relief requested in the Petition.

Respectfully submitted,

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EX PARTE

November 21, 2002

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

The attached paper titled: *Regulation of an Element Found No Longer to Meet Section 251's "Necessary and Impair" Test* filed on behalf of Qwest Communications International Inc., has been filed in the above docketed proceedings.

In accordance with FCC rule 1.49(f), this *Ex Parte* paper is being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(1).

Sincerely,
/s/ Cronan O'Connell

cc's (all via E-mail)

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Attachment

Regulation of an Element Found No Longer to Meet Section 251's "Necessary and Impair" Test

I. A BOC's Provision of an Element Required Pursuant to Section 271, Exclusively, Should be Regulated Subject Only to the Commission's General Pricing Authority Under Sections 201 and 202 of the Act.

A. The Commission Already Has Established that Once an Element Comes Off Section 251's Unbundling List and Is Provided Solely Pursuant to Section 271, the Only Pricing Requirements that Apply Are The Generic Title II Pricing Requirements.

The Commission already has recognized that once it has "determined that a competitor is not impaired in its ability to offer services without access to [a particular] element," and the element is offered pursuant only to Section 271 of the Act, the "market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market."[1/] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3906 ¶ 473 (1999) ("*UNE Remand Order*"). While the Commission recognized that Section 271 might in many cases impose an independent obligation on the BOC to provide the element in question, the Commission correctly concluded that "the prices, terms, and conditions set forth under Sections 251 and 252 do *not* presumptively apply to the network elements on the competitive checklist of Section 271." *Id.* at 3905 ¶ 469 (emphasis added). Rather, the Commission determined that the Section 252 pricing requirements apply *only* when the checklist element is unbundled pursuant to Section 251.

1/ Qwest notes that Verizon has filed a Petition for Forbearance, CC Docket No. 01-338 (July 29, 2002), arguing that where the Commission has found that an element no longer satisfies the section 251(d)(2) test, it should deem the corresponding section 271 checklist item to be satisfied and thus forbear under 47 U.S.C. § 160(c) from requiring its provision. For purposes of this ex parte, however, we have assumed that the corresponding section 271 obligation is still in force.

Where the Commission finds that a network element no longer meets the unbundling standards in Section 251(d)(2), because competitors "can acquire [the element] in the marketplace at a price set by the marketplace . . . it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices." *Id*. at 3906 ¶ 473. Instead, the Commission determined, "the applicable prices, terms and conditions for that element [should be] determined [solely] in accordance with Sections 201(b) and 202(a)." *Id.* at 3905 ¶ 470.

B. The Commission Should Relax the Tariffing Requirements for a BOC's Provision of an Element That No Longer Must Be Unbundled Pursuant to Section 251's "Impair" Test.

Having found that it would be counterproductive to apply TELRIC to the prices for checklist elements that are found to no longer meet the impair test under Section 251, the Commission should similarly conclude that it is not appropriate to subject the provision of that element to dominant carrier regulation. Although *all* telecommunications services provided by an ILEC are presumptively treated as dominant, *see*, *e.g*., Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd, 22745, 22747-48 ¶ 5 (2001); Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, 15767 ¶ 13 (1997) ("*LEC Classification Order*"), in finding that an element no longer meets the Section 251 "impair" test, the Commission makes the same findings that are essential to support the conclusion that BOCs lack market power with respect to the provision of that element. Specifically, in finding that CLECs would not be impaired without *any* access to an incumbent's network element, the Commission *necessarily* finds that CLECs can practicably obtain that element (or suitable substitutes for that element) elsewhere (including through self-provisioning) and that there are no material barriers to doing so. If the BOC cannot "profitably . . . raise and sustain" prices "significantly above competitive levels by restricting its own output," Commission precedent establishes that with respect to the provision of that element, the BOC is non-dominant. *LEC Classification Order* at 15762-63 ¶ 6.[2/] The Commission accordingly should both find that an ILEC's provision of an element that has been found to no longer meet the 251 checklist is nondominant, and forbear under Section 10 of the Act from dominant carrier regulation in connection with the incumbent's provision of such an element.[3/]

At a minimum, even if the Commission is not prepared to make a finding that the BOC's provision of such elements is non-dominant—or is not prepared to forbear entirely from dominant carrier regulation—the Commission should require only streamlined federal tariffing of the element, such as that available under the Commission's pricing flexibility rules.[4/] The Commission has recognized that such modified tariff regulation is appropriate where the market

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2/ The Commission has consistently recognized in finding services non-dominant that not just actual but "potential competition can ensure that prices continue to remain just and reasonable" enough to support a finding that the market will not be subject to distortion by any one player. Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3323-34 ¶ 96 (1995) ("*AT&T International Reclassification Order*").

3/ Given the Commission's conclusion that section 201 will govern the provision of elements offered pursuant to section 271 of the Act, dominant carrier pricing regulation would no longer be "necessary to ensure that the [ILEC's] charges [or] practices" in connection with that element "are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a). Such forbearance will "promote competitive market conditions." 47 U.S.C. § 160(b). *See LEC Classification Order* at 15806-07 ¶ 88 (recognizing that dominant carrier tariff regulations can "stifle price competition and marketing innovation"); *see also AT&T International Reclassification Order* at 3288 ¶ 27; Second Report and Order, *Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1509 ¶ 175 (1994).

4/ Even if the Commission determines that some form of minimal tariff regulation is appropriate for such elements, any such regulation should be imposed only on the *federal* level. As Qwest and others have explained, any *state* regulation of the pricing or other terms under which de-listed elements are offered would be preempted. *See* Ex Parte Letter from Herschel L.

has become sufficiently competitive, and there are enough available alternatives, to prevent the ILEC from "exploit[ing] over a sustained period any individual market power," even if the Commission could not conclude that the ILEC could meet the test for a showing of non-dominance.[5/] Thus, while the Commission was not prepared to make a finding that ILEC's provision of interstate intraLATA toll service was non-dominant, for example, the Commission found the market sufficiently competitive to justify a modified tariffing regime, permitting ILECs to file tariffs on one day's notice without cost support and with a presumption of lawfulness. *Pricing Flexibility Order* at 14249-51. The Commission similarly permitted ILECs to offer contract tariffs with tailored term and volume discounts. *Id.* at 14234.

A finding of no-impairment clearly meets this "substantial competition" standard for relaxed tariffing requirements. As noted above, the CLEC's other options remove any ability or incentive for the incumbent to act anticompetitively. Modified tariff regulation would allow the Commission additional pricing authority to supplement its general Section 201 authority, while still providing BOCs with the flexibility to offer competitive services and the freedom from the full panoply of burdensome dominant carrier regulation.

Abbott, Jr., BellSouth, R. Steven Davis, Qwest, Paul Mancini SBC, & Susanne Guyer, Verizon to Michael K. Powell, Chairman, FCC at 8-9 (Nov. 19, 2002).

[5/] *See* Fifth Report and Order, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221, 14247-48 ¶ 53 (1999) ("*Pricing Flexibility Order*"), *aff'd sub. nom WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

II. The Requirements of Providing an Element Under Section 251 Are Not Applicable When the Element Is Provided Solely Subject to Section 271.

A. The Specific Terms and Conditions Required Under Section 251 Do Not Apply to Elements Provided Under Section 271.

As noted above, the Commission has expressly concluded that "the prices, terms, and conditions set forth under Sections 251 and 252" are not applicable to an incumbent's provision of a network element that no longer must be unbundled pursuant to Section 251, and is provided solely pursuant to Section 271. *UNE Remand Order* at 3905-06 ¶¶ 469-73. The Commission's discussion in the *UNE Remand Order* applies equally to both pricing and the other terms and conditions that the Commission has required under Section 251(c)(3) of the Act. The only way that the requirements of either Section 251(c)(3) or Section 252(d)(1) could apply to checklist elements provided solely under Section *271* of the Act is through Section 271(c)(2)(B)(ii), which authorizes the Commission to ensure that BOCs seeking long distance authority provide "[n]ondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)." Because the plain language of the statute does not differentiate between the applicability of the requirements of Sections 251(c)(3) and 252(d)(1), the Commission's determination in the *UNE Remand Order* that this provision of Section 271 provides no basis for continuing to apply the pricing terms of Section 252(d)(1) to an element *that no longer must be unbundled under Section 251* must similarly preclude the continued application of the terms and conditions under Section 251(c)(3).

This outcome makes perfect sense. Having determined that a CLEC is not impaired without access to an element because that element is competitively available and is no longer included in the unbundled elements referred to in Section 251(c)(3), there are no remaining applicable "requirements" under Section 251(c)(3) (or 252(d)(1)) as to that element. At that point, therefore, the reference in the Section 271 checklist to the "requirements" of Section

251(c)(3) with respect to that element should be deemed automatically satisfied or simply nullified. This statutory reading also is the only one that produces a sensible policy result: if an element is competitively available, there is no reason to mandate the particular terms under which that element is offered whether by a BOC or any other ILEC. Since, as the Commission has recognized, the goal of Section 251 unbundling is to produce terms that "at best, [are] designed to reflect" the terms that would result in "a competitive market," *UNE Remand Order* at 3906 ¶ 473, it makes little sense to regulate the terms of any class of providers in the market once the market has been found to be functioning in a competitive fashion.

Thus, once the Commission determines that an element on the 271 checklist no longer must be unbundled under Section 251, a BOC that seeks to obtain or maintain its long distance authorization simply must provide that element in accordance with the general nondiscrimination and reasonableness requirements contained in Sections 201 and 202. For example, Section 251(c)(3) would no longer directly impose the combinations rules on an element that the Commission has determined need no longer be unbundled at all under Section 251. And the combination rules are not—and cannot—be reintroduced through Section 271. Indeed, the Commission already reached this conclusion in the Texas 271 proceeding, recognizing first that where the requirement to combine elements under Section 251 had been extinguished, Section 271 supplied no independent basis to require such combination. *See* Memorandum Opinion and Order, *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18474-75 ¶ 235 (2000) (where Section 251 does not require combination, SWBT "need not provide [that combination] at all."). Second, the

Commission concluded that SWBT certainly could not be precluded from *charging* for performing such combinations where it did in fact provide them. *Id.* (Commission "precluded . . . from denying [SWBT's 271] application on the ground that SWBT has somehow violated the Act by setting particular pricing conditions on the provision of UNE combinations" that were no longer required under Section 251.). Even if the Commission determined that an ILEC could be required to provide some combinations pursuant to Section 201, the ILEC would simply have to do so in a nondiscriminatory and reasonable manner, and there would be no valid basis to prohibit or otherwise regulate reasonable charges for the work required to provide those combinations.

For example, to the extent that loops remain subject to Section 251 of the Act , the BOCs (and all incumbent LECs) will continue to provide them subject to the requirements of that provision. If, however, the Commission were to remove switching from Section 251's ambit, BOCs would continue to provide switching *solely* pursuant to Section 271, and thus at market prices, rather than at TELRIC. A CLEC that wished to obtain the equivalent of UNE-P at that point accordingly would be entitled to obtain the TELRIC rate for the loop, but would have to pay the market price for switching, including the cost for any work the ILEC were required to do to combine the loop with the switch. The same would be true with respect to the shared transport element (and any work required to combine shared transport with another element), which could no longer meet the Section 251 "impair" test if switching were found to no longer meet that test. *See UNE Remand Order* at 3708 (finding that "[i]ncumbent LECs are not required to unbundle shared transport where they are not required to offer unbundled local circuit switching"). Of course, a BOC alternatively could provide an entirely market-priced product, at its option, charging a market rate for all elements typically included in "UNE-P" and treating combinations charges in whatever manner the market demands**.**

B. The Provisions of 252 Relating to Interconnection Agreements Do Not Apply to the Provision of an Element That Is Required Solely Under Section 271.

The Commission should clarify that terms for elements a BOC must provide pursuant to Section 271—but no longer pursuant to Section 251(c)(3)—need not be included in Section 252(a)(1) interconnection agreements. The Commission already has expressly recognized that obligations not created by section 251 of the Act need not be addressed in parties' interconnection agreements. *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3703 ¶ 22 (1999) (*cert. denied, sub. nom, Global Naps, Inc. v. FCC*, 122 S. Ct. 808 (2002) ("Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may *voluntarily* include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act.") (emphasis added). The Commission recently confirmed this position in its order responding to Qwest's petition for declaratory ruling regarding the scope of section 252(a)(1)'s filing requirements. There, the Commission indicated that, as contemplated by sections 251 and 252, an "interconnection agreement" was an "agreement[] to implement" a carrier's duties pursuant to "sections 251(b) and (c)." Memorandum Opinion and Order, *Qwest Communications International Inc.*, WC Docket No. 02-89, FCC 02-276 (rel. Oct. 4, 2002) (emphasis added).

The contrary rule—that BOCs are required to include the terms and conditions of the provision of elements required solely under section 271 in their section 252 interconnection agreements—would have perverse results. As noted above, once provision of an element is no longer required under section 251 but only under section 271, the pricing of that element is properly subject only to the market-based pricing principles of 47 U.S.C. 201. If, however, BOCs were required to include the pricing terms for such elements in their 252 agreements, those pricing terms would be subject to the arbitration requirements through which most 252 agreements are determined. Thus, if a CLEC did not want to agree, during negotiations with the BOC, to the market price offered by the BOC for a particular section 271 checklist item, the CLEC could demand arbitration, which would mean that the *state* ultimately would have to set the rate for the provision of that element. But this result would be entirely inconsistent with the fact that the pricing of that element would be subject only to the reasonableness and non-discrimination requirements of section 201.

III. Once the Commission Recognizes that the Marketplace Has Changed Such That an Element Should Come Off the List, It Should Ensure That Its Decision Is Implemented as Soon as Possible To Eliminate Regulatory Lag.

In finding that an element no longer satisfies the impair test, the Commission necessarily recognizes that there is no longer any justification under the Act, or the policies of the Act, to mandate that ILECs unbundle that element—especially at TELRIC rates. To the contrary, continuing to require unbundling at below-cost TELRIC rates will discourage facilities-based investment in favor of economically inefficient, and irrational, UNE-based entry. Thus, the Act requires that any transition for eliminating the unbundling obligation for an element be streamlined and limited, so that ILECs are not subject to unnecessary burdens and so that the industry as a whole can benefit from increased, market-based competition as soon as practically possible.

As the industry's experience with the implementation of the *ISP Remand Order*[6/] demonstrates, however, in order to achieve that goal, the Commission needs to take explicit actions to ensure a smooth and short transition period, rather than leaving this issue to the parties to work out. Otherwise, it may well take years for the Commission's determinations to be implemented. Because interconnection agreements are usually several years long, are subject to the pick and choose rules, and are typically renewable, it can be extremely difficult to extirpate an interconnection agreement obligation that has since been invalidated by subsequent FCC rulings. Even where the agreements have "change of law" provisions, these provisions in some cases may not be triggered until the Commission's order has been finally appealed (and any remand proceedings are complete); further, CLECs typically have contended that the change in law provisions are not self-executing, so that any resulting revisions to the agreement must be negotiated. When the Commission eliminates an unbundling or similar obligation, CLECs clearly do not have any incentive to facilitate that elimination; rather, they have strong incentives to delay the process. Indeed, in Qwest's own experience, after the issuance of the *ISP Remand Order*, some CLECs did not even bother to respond to Qwest's repeated requests that the FCC's new rules be implemented. Thus, as a practical matter, notwithstanding the Commission's recognition that ISP traffic is not properly subject to the reciprocal compensation requirements and that payment of such compensation on ISP-bound traffic had created significant, market distorting opportunities for regulatory arbitrage, ILECs continue in many instances to be subject to obligations to pay reciprocal compensation on ISP-bound traffic.

6/ Order on Remand, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

To avoid a repeat of this experience, the Commission should accordingly take several actions to facilitate the transition to its new rules. First, the Commission should make clear that it will expect, and permit, parties to begin the process of negotiating new agreements or provisions right away to implement the change in law, whether or not the parties' agreement provides that the amended provision would be immediately effective. In this way, the parties could ensure that the new agreement or term would be in place as soon as the "change in law" provision was satisfied *or* as soon as the existing agreement has expired—whichever is first. This rule should apply even if the contract provides that no negotiations need begin until after the order is final and all appeals have been exhausted. The Commission should make clear that any refusal to negotiate the required amendment would be deemed a violation of the section 252(b)(5) duty to negotiate in good faith. Further, the Commission should clarify that *either* party to the interconnection agreement can trigger the duty to negotiate the required revisions. *See* Order on Reconsideration, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, 17825-26 ¶¶ 34, 35 (2000) (both incumbent and competitive LECs have the duty to negotiate open issues in interconnection agreements in good faith).

Second, the Commission should make clear that any new agreements that are entered into following the issuance of the Commission's order, or any agreements that are renegotiated, *must* be consistent with the Commission's amendment to the rules (unless, of course, the Commission order has been vacated by the court of appeals). In other words, the Commission should make clear that states are specifically preempted from requiring unbundling that is inconsistent with the Commission's revised rules simply because any appellate review of those rules is not yet complete. The Commission adopted essentially this rule in the *UNE Remand Order*, at

3766 ¶ 151 ("We expect parties to implement the requirements of this Order as they negotiate new interconnection agreements.") and in the *ISP Remand Order*, at 9189 ¶ 82 ("The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements."); it should do so more explicitly here. Further, the Commission should make clear that CLECs cannot evade this rule by trying to opt in to or renew existing agreements that implement the superceded obligation. For this purpose, the Commission should clarify that agreements renewed after the issuance of the FCC order are "new" agreements, including agreements that are renewed on a month-by-month basis, and thus would be subject to whatever the new Commission rules are (including any transition period as discussed below).

Third, to the extent the Commission concludes that it must adopt a transition period to allow UNE-based CLECs with embedded bases to adapt their plans to accommodate the new rules, it should establish a discrete time period for that transition which will begin the date the Commission's order is issued. The Commission should make clear that the transition period will allow CLECs whose agreements expire during that period, or CLECs whose rights would be affected by the triggering of the change of law provisions in an existing agreement, to enjoy whatever the Commission's transition rules are until the expiration of that period—*e.g.* 12 months from the date of the issuance of the order. However, CLECs whose agreements are longer than the transition period and whose agreements are not impacted during the transition period by the change in law, will not be permitted to take advantage of that transition period at all, since it is outside the calendar timeframe that the FCC provided for the transition; rather, they will be expected to begin preparing for the transition during the course of their existing agreement. Thus, if the Commission were, for example, to adopt a one year transition period for an element that was coming off the UNE list and it took an ILEC and a CLEC three months to determine the terms of a new agreement consistent with the Commission's new rules, the remaining transition period would be nine months since in total that would have given the CLEC the full year mandated by the Commission.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 03-260, 2) served, via email on Ms Janice Myles, Wireline Competition Bureau, Competition Policy Division at janice.myles@fcc.gov, 3) served, via email on the FCC's duplicating contractor Qualex International, Inc., at qualex.int@aol.com and 4) served, via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

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